

ROE Review Board for Military Personnel Facing Adverse Administrative Action Due to Alleged Violations
of Rules of Engagement

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I. Providing Due Process Rights to Military Personnel Facing Administrative Action for Rules of Engagement Violations

The purpose of this paper is to propose the creation of an autonomous administrative oversight board – **ROE Review Board** – for military personnel who face adverse administrative punishment for alleged violations of combat rules of engagement (ROE).

II. Law of War vs. Rules of Engagement

All military personnel are required to abide by the law of armed conflict, also known as the law of war, as codified in Army Field Manual 27-10.¹ The central international treaty dealing with the law of war is the 1949 Geneva Conventions.² The goal of the law of war is to mitigate the accompanying evils of war by: “(a) Protecting both combatants and noncombatants from unnecessary suffering; (b) Safeguarding certain fundamental human rights of persons who fall into the hands of the enemy, particularly prisoners of war, the wounded and sick, and civilians; and (c) Facilitating the restoration of peace.”³

¹ U.S. DEP’T OF ARMY, FIELD MANUAL NO. 27-10: THE LAW OF LAND WARFARE (1956).

² The Geneva Conventions are set out in four categories: (1) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; (2) Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; (3) Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; and (4) Geneva Convention Relative to the Protections of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

³ U.S. DEP’T OF ARMY, FIELD MANUAL NO. 27-10: THE LAW OF LAND WARFARE ¶ 2 (1956).

In tandem with the strict mandates associated with the law of war, some countries, to include the United States, self-impose so-called Rules of Engagement (ROE) as restrictive additions to the law of war in order to further limit the lawful application of the use of force in combat. Enclosure 1 is a recently issued ROE issued by General John R. Allen, the Commander of NATO's International Security Assistance Force (ISAF). Although labeled as a "Tactical Directive," it is an ROE in that it "provides guidance and intent for the employment of force in support of ISAF operations"⁴ by limiting when, how, and where violence may be utilized in combat situations. ROE are considered "lawful orders." Hence, a violation of an ROE can be a criminal offense under the military's Uniform Code of Military Justice.

III. Administrative Punishment for Violating ROE

Since the start of the "War on Terror"⁵ in 2001, the United States has engaged in two major military actions – Iraq⁶ and Afghanistan.⁷ In both conflicts the United States promulgated numerous ROE to further limit the use of force. These ROE were changed many times over the years as dictated by political considerations. Indeed, as the conflict in Afghanistan continues, ROE are still subject to revision.

Unlike the law of war, which is static in nature until revised by international treaty, ROE can be changed at any time based on political or policy objectives. While the rule of law provisions related to the law of war reflect fundamental concepts of human behavior that comport with universal moral values recognized across cultural lines – don't kill civilians, don't kill enemies that surrender, don't destroy civilian property, etc. – ROE address restrictions on behavior that are not intrinsic in nature. In many instances, the prohibited behavior set out in an ROE is extremely subtle and produces random outcomes. Micromanaging the otherwise lawful use of force under the law of war, as ROE require, can result in confusion on the one hand, and inaction on the other. Service members are often unsure what the ROE requires and may simply choose to do nothing for fear of violating the ROE.

⁴ COMISAF Tactical Directive, 30 Nov. 2011, HQ, ISAF.

⁵ The term War on Terror is used both as a metaphor to describe a general conflict against international terrorist groups and, more precisely, to describe the ongoing international armed conflict between the United States of America and the "Taliban, al-Qa'eda, or associated forces." See Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600, 10 U.S.C. § 948 (2006).

⁶ See Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. 107-243, 116 Stat. 1498, 1498-99 (2002) (codified at 50 U.S.C. § 1541). The Authorization cited many factors to justify the use of military force against Iraq, including that alleged weapons of mass destruction and programs to develop such weapons posed a "threat to the national security of the United States," *id.* at 1498, and Iraq's "capability and willingness to use weapons of mass destruction against other nations and its own people," *id.* at 1499.

⁷ Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541).

As a consequence of the proliferation of ROE during the War on Terror, many soldiers have been wrongfully accused of violating applicable provisions. In some instances, the soldiers were unaware of the violation, but in others it is evident that the highest levels of the chain of command itself are unclear about the application and function of a given ROE. Furthermore, in some instances similar violations of ROE are not punished equally. Not only are some service members disciplined by criminal action while others are disciplined by administrative action, in many cases service members receive absolutely no punishment whatsoever for violations of ROE. Enclosure 2 provides a stunning example of how the Staff Judge Advocate for US Marine Corps Forces Central Command deemed the violation of an ROE in Afghanistan on October 28, 2011, by Marine Lt. Col. Seth Folsom, as excusable and not worthy of “disciplinary action” because Lt. Col. Folsom’s use of “non-precision munitions” into a civilian area “did not result in any civilian casualties.” Ironically, Lt. Col. Seth Folsom unjustly punished a subordinate under his command, 1stLt Joshua C. Waddell, for use of precision weapons on November 1, 2011, when Waddell ordered snipers to disable a tractor that was carrying a wounded enemy combatant. Similar to Lt. Col. Folsom’s use of force three days prior, no civilians were harmed.

For those who violate the ROE the military command would generally charge the service member with a crime (disobeying a lawful order). In some instances, however, the military does not charge the service member with a crime but uses adverse administrative measures to punish. While a service member has numerous due process rights when charged with a crime, due process rights associated with adverse administrative actions are far more limited in nature. Hence the need for some level of additional impartial review.

The case of Marine 1stLt Joshua C. Waddell (encl. 3 – Addicott letter to Board of Corrections for Naval Records) mentioned herein illustrates the problem. The military chain of command wrongfully relied on an alleged violation of an ROE to employ severe administrative punishments tantamount to terminating the officer’s opportunity for promotion in the military. While 1stLt Waddell was never charged with a crime, he was relieved from his position as Executive Officer and given a fitness report (FITREP) that recommend no promotion (encl. 4). If 1stLt Waddell had been charged with a crime, he would have had access to a full range of due process rights. Since his commander elected administrative action only, 1stLt Waddell’s only functional recourse outside of his chain of command was to appeal the FITREP to an administrative board in the United States (Board of Corrections for Naval Records) – a process limited in due process and extensive in costs and time.

IV. Proposing Legislation

While the role of Congress is not to conduct war, Congress does have the power under Section 8 of the Constitution to “make Rules for the ... Regulation of the land and naval Forces.” In order to provide a neutral level of review outside of the chain of command for service members who are facing adverse administrative actions such as relief or adverse fitness reports, an independent **ROE Review Board** should be established in theater to conduct an impartial review prior to said adverse actions being finalized against the service member. The board should be composed of senior military officers as selected and appointed by the applicable Combatant Commander. The board should be placed in the theater of combat operations in order to facilitate the gathering of evidence as expeditiously as possible, to include witness statements, Preliminary Investigation reports, Command Investigation reports, etc. The service member should have the right to appear before the board. The board should be required to make specific findings and recommendations. Said findings and recommendations would go to the appointing authority who would make a final determination. The details of the review process should be drawn from the due process provisions in accordance with those procedures found in Army Regulation 15-6, Procedures for Investigating Officers and Boards of Officers.

The **ROE Review Board** is not designed to supersede any of the provisions already available for service members to include recourse within the chain of command. It functions as an extra level of protection outside the chain of command.

RECOMMENDATION:

An **ROE Review Board** be created in order to provide an impartial review process for service members accused of violations of ROE but facing adverse administrative action only. The **ROE Review Board** would:

- Consist of at least three senior military officers.
- Be appointed by the subject Combatant Commander.
- Convene in the theater of combat operations on a permanent basis.
- Apply the due process provisions promulgated by the DOD.
- Consider all requests dealing with alleged violations of ROE or Tactical Directives and determine eligibility of the case.
- Conduct a thorough, comprehensive, and properly documented investigation.
- Make specific findings and recommendations to the Combatant Commander.

V. Conclusion

Due to the confusing and changing nature of ROE and how they are applied, it is painfully apparent that ROE have proven to be a source of injustice to service members in the field of combat operations. This is particularly true when the chain of command uses administrative punishment as a form of discipline, providing little recourse to the service member.

Since nothing is absolutely certain in the realm of combat, it is clear that service members need an extra level of due process protection when it comes to the issue of alleged ROE violations. In fact, the creation of an autonomous **ROE Review Board** which functions outside of the chain of command may prove useful in revealing ROE that should be repealed. In addition, an autonomous **ROE Review Board** would go far in eliminating perceptions of double standards.

The recommendations put forth in this paper are meant as a starting point in how best to provide this level of review. At a minimum an **ROE Review Board** will better clarify what exactly is expected of our troops in the field, thereby alleviating fears of unjust treatment from the chain of command when adverse administrative measures are proposed against a service member.

SIGNED

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